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Nos. ~~899~~, 942, ~~999~~ and ~~1003~~

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JOHN F. DAVIS,

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~899~~ 28

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.

No. ~~942~~ 38

CHARLES E. BRUNDAGE, ET AL., constituting the NORTHERN PACIFIC STOCKHOLDERS' PROTECTIVE COMMITTEE, APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

No. ~~999~~ 43

CITY OF AUBURN, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. ~~1003~~ 44

LIVINGSTON ANTI-MERGER COMMITTEE, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR THE CITY OF AUBURN

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 899

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.

No. 942

CHARLES E. BRUNDAGE, ET AL., constituting the NORTHERN PACIFIC STOCKHOLDERS' PROTECTIVE COMMITTEE, APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

No. 999

CITY OF AUBURN, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 1003

LIVINGSTON ANTI-MERGER COMMITTEE, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR THE CITY OF AUBURN

OPINIONS BELOW

The opinion of the district court is not yet reported. The decisions of the Interstate Commerce Commission are reported at 328 I.C.C. 460, 331 I.C.C. 228, 331 I.C.C. 869, and 333 I.C.C. 391. The opinions of the district court and

of the Commission are reprinted in the separately-bound Appendix to Jurisdictional Statement for the United States in No. 899 (hereafter cited as "App.").[2]

JURISDICTION

The order of the three-judge district court denying injunctions against the orders of the Commission and dismissing the complaints was entered November 20, 1968 (App., pp. 59-60). Notice of appeal was filed by the City of Auburn December 5, 1968 and the appeal was docketed January 30, 1969. Probable jurisdiction was noted February 24, 1969. The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253, 2101(b). *Baltimore & O. R. Co. v. United States*, 386 U.S. 372 (1967).

STATUTES INVOLVED

The relevant provisions of the Interstate Commerce Act and the National Transportation Policy are reprinted in the Brief for the United States.

QUESTION PRESENTED

Whether the Interstate Commerce Commission's approval of the merger of the Great Northern and Northern Pacific railroad systems is supported by adequate findings on a complete and current record that benefits to the public interest convincingly outweigh (1) the elimination of substantial rail competition in the Northern Tier, and (2) the infliction of severe economic injury on the City of Auburn.

STATEMENT

This is a direct appeal from a final judgment of the district court upholding the Interstate Commerce Commission's approval of the Northern Lines merger. Appeals by the United States (the plaintiff below), the Northern Pacific Stockholders Protective Committee, and the Livingston Anti-

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[2]The order of the district court filed December 11, 1968 amending its opinion is reprinted in the Jurisdictional Statement for the United States, No. 899 (Appendix G, p. 29).

Merger Committee have also been docketed (Nos. 899, 942, and 1003, this Term).[3] The facts relating to the merger and to the opinions of the Commission and the district court are fully set forth in the Brief for the United States. The following statement is limited to the particular facts which concern the City of Auburn and the issues not raised by the other appellants.

Auburn is a city of 19,000 in Western Washington, halfway between Seattle and Tacoma. It is at the heart of the region's growing industrial complex, in the Green River Valley where lies the only land available for heavy or light industrial expansion in the Greater Seattle area. The Northern Pacific's yard at Auburn is the western terminus for all its transcontinental trains, and employs 500 persons.

The yard payroll is almost $2 million. If other employment related to the yard is included the annual wages in Auburn which depend on the railroad yard exceed $3 million. At least 70% of these wages are spent in Auburn, and turn over three times before leaving the city.

The record before the Commission spoke as of 1962.[4] It showed that if the merger were approved the Auburn yard would be closed and that the town of Everett, on the other side of Seattle, would become the western terminus for all transcontinental trains operated by the New Company. This would not only deprive the Auburn economy of $6 million annually by reason of the yard closing, but would reduce Auburn's freight service to one local train daily in each direction between Auburn and Yakima.

The Commission's Hearing Examiner, recommending approval of the merger, reviewed the evidence of injury to

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[3]Notice of appeal was also filed by the Montana Board of Railroad Commissioners, but no appeal was docketed.

[4]The hearings held after the Commission's first decision but before its reversal on reconsideration were limited, as the district court found, to updating the record on "the amount of estimated savings resulting from the proposed merger" (App., p. 9).

Auburn's economy through job loss but concluded without explanation that this and similar evidence relating to other affected communities was more than offset by benefits to the public which the merger would bring about. Nowhere in the Examiner's report was the elimination of Auburn's transcontinental freight service discussed.

Neither the Commission's first decision nor its reversal on reconsideration specifically discussed any of the evidence relating to Auburn. Although the city was cursorily identified in the latter opinion, along with other communities, as "participating in the further hearings" which preceded (331 I.C.C. at 239 n. 7, App., p. 274), the Commission merely stated its conclusions (1) that "these economic disturbances affecting local governments and populations would be primarily in the nature of temporary dislocations * * * offset by positive benefits" in many instances (331 I.C.C. at 283-84, App., p. 335), and (2) that "the record does not show * * * that the transportation requirements or the well-being of these areas and communities would best be served by denial of these applications" or "indicate any long-range, serious adverse effect on them" (331 I.C.C. at 284, App., p. 336).

Auburn was the first to seek judicial review of the Commission's orders. On May 3, 1968 the city instituted an action in the United States District Court for the Western District of Washington to enjoin and set aside the Commission's approval of the merger (*Auburn v. United States*, Civ. No. 7706). A similar proceeding was instituted on May 5, 1968, in the United States District Court for the Southern District of New York, by the Northern Pacific Stockholders' Protective Committee (*Brundage v. United States*, Civ. No. 1855-68). The present action was filed May 9, 1968 by the United States. The City of Auburn and the Protective Committee, among others, intervened in the Government action as plaintiffs.

In the district court Auburn attacked the staleness of the record and the inadequacy of the Commission's findings with respect to the impact of the merger on the city, adop-

ting as well the contentions of the United States with respect to the anticompetitive consequences of the merger. The opinion of the district court did not mention Auburn's contentions on the relegation of the city to once-a-day local connecting freight service; on the issue of job loss, the court summarily concluded (App., p. 53) that

> "the Commission considered Auburn's position in the context of the whole problem. The possible adverse economic effect upon the city was thought not to justify withholding the benefits of approval. On the whole case this is a reasonable judgment of the Commission which we accept."

ARGUMENT

We fully adopt the contention advanced by the United States that the Commission, in its ultimate authorization of the merger, and the district court in its affirmance, applied an erroneous concept of the Commission's duty when confronted with a seriously anti-competitive railroad merger proposal. A further ground warranting plenary review in this Court, moreover, is the Commission's erroneous view of its duty to make reasoned findings, on a reasonably current record, concerning the impact of such a merger upon affected communities and to explain why the asserted public benefits resulting from the merger convincingly outweigh any adverse effects found.

1. In the present case the Commission made no findings at all on the specific injury to Auburn which the record showed would result from the Northern Lines merger. But that record was itself fatally stale, in that it failed to reflect significant changes in Auburn's economy occurring since 1962 when the record closed. The changes are so substantial that even the merging railroads assert (outside the record) that they have completely altered their plans for the Auburn yards (see the opinion of the district court, App., p. 53 n. 24). Yet when the Commission reopened the record in 1967 to update the evidence, it limited the scope of the new hearings to the issue of cost savings resulting from the proposed merger.

Neither the Commission nor the district court made any findings to justify this severe circumscription of the scope of the reopened hearings. In their brief below, counsel for the Commission merely urged (p. 101) that "an agency is not required to continuously reopen its proceedings to update the record in the behest of various parties." This is not a case, however, where a losing opponent of the merger sought to put off the evil day by reopening the record for a second attempt at success. It was the merging railroads themselves which, having lost in their bid for approval, petitioned for a second chance—and got it. If the proceedings were to be reopened after a final decision against the merger had been rendered, the Commission was obligated to ensure that the record was reasonably current as to all aspects of the public interest, including the impact of the merger on affected communities such as Auburn.

The limiting of the reopened hearings to the cost-saving issue prevented the Commission from hearing evidence bearing closely upon the impact of the merger on Auburn. For example, the Denver & Rio Grande Western Railroad was denied an opportunity to prove that the merger "threat[ened] * * * the continued movement of traffic over the so-called central corridor routes, in which Rio Grande participates" (331 I.C.C. at 242, App., p. 269). Auburn shippers use Rio Grande as part of their routing to Denver. Any serious injury to Rio Grande might well therefore impair Auburn's position in competition with other suppliers for markets served via Denver. The record, however, is totally silent on this important issue.

Similarly, the merging railroads presented testimony at the reopened hearings to show a mere 10% increase in property values between 1962 and 1965 in the affected territory. In a properly broad proceeding, Auburn would have adduced evidence that property values in the Auburn area had increased 100% during that period, which would in turn have given much more significance to any adverse impact of the merger on the Auburn area. Nor does the record include evidence of train abandonment proposals advanced

by the merging railroads after the record closed which are inconsistent with their intentions as represented on the record.

2. The Commission appears, moreover, to have misconceived the nature of the findings it must make when injury to a community is alleged and proven to result from a proposed railroad merger. The importance of reasoned findings was emphasized only this Term in *Baltimore & O. R. Co. v. Aberdeen & R. R. Co.*, 393 U.S. 87, 92 (1968), where the Court renewed its caution against "the haze of so-called expertise * * * becoming 'a monster with no practical limits on its discretion'" and held that result "impermissible under the Administrative Procedure Act." Yet the Commission's findings on the issues raised by Auburn do not even purport to explain the rationale underlying the agency's ultimate conclusion that the merger should nevertheless be approved. The Commission's rejection of Auburn's contentions (p. 4, *supra*) is

> "merely a collection of conclusory comments; it may be concise, but it certainly does not dispose of the issues raised * * *."

West Michigan Telecasters, Inc. v. FCC, 396 F.2d 688, 691 (D.C. Cir. 1968).

Insofar as the Commission's opaque pronouncements are at all enlightening, they seem to misconceive the obligations of the parties to the administrative proceeding. The burden is upon the applicants for merger affirmatively to show with "convincing evidence that it will serve the national interest" (*Penn-Central Merger Cases*, 389 U.S. 488, 500 (1968)). By demanding that "the record * * * show * * * that the well-being of these [affected] areas and communities would best be served by denial of these [merger] applications" the Commission placed the burden of proof on the opponents of the merger, where it does not belong, and relieved the merging railroads of the obligation thus imposed on them by statute.

3. The district court ignored all these problems, which had been strongly urged by Auburn, and merely character-

ized the Commission's "judgment" as "a reasonable [one] * * * which we accept" (App., p. 53). Auburn's contentions on the staleness of the record were ignored; our contentions on the degradation of Auburn's freight service were ignored; only the injury to Auburn from job loss was mentioned, but not even our contentions on the inadequacy of the Commission's findings in that regard were analyzed or weighed. Nothing in this peremptory disposition of the issues should preclude this Court from making its own determination—now the only meaningful judicial review Auburn will ever be afforded—that the Commission failed in its duty to make adequate findings on a complete and current record.

CONCLUSION

For these reasons, as well as the reasons set out in the Brief for the United States, the judgment of the district court should be reversed.

Respectfully submitted,

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JOEL E. HOFFMAN

May 1969.